Supreme Court, U.S.
FILED
MAR 22 2001
OFFICE OF THE CLERK

CASE NO.: 00-1334

IN THE SUPREME COURT OF

THE UNITED STATES

BOBBY W. KENNEDY, et al.

Petitioners

v.

FRIGIDAIRE COMPANY, et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE ALABAMA SUPREME COURT'S DECISION INVOLVED A FEDERAL QUESTION WHICH WOULD PROVIDE THIS COURT WITH JURISDICTION PURSUANT TO 28 U.S.C. § 1257?

II. WHETHER THE PETITIONERS FAILED TO PRESERVE ANY ALLEGED FEDERAL ISSUES BY FAILING TO ADDRESS SUCH ISSUES BEFORE THE TRIAL COURT OR THE ALABAMA APPELLATE COURTS?

LIST OF PARTIES

The following parties judgment is under review by the Petition for Writ of Certiorari.

Petitioners

Bobby W. Kennedy

Carolyn W. Kennedy

Jimmy P. Kennedy

Respondents

Allgas, Inc.

C.L. Jimmy Fortenberry

Frigidaire Company

Lampton-Love, Inc.

Bruce Laviner

Ronald Wayne Puckett

White Consolidated Industries

Pursuant to Rule 29.6, Respondents provide the following additional corporate disclosure statement:

Liquified Petroleum Gas Management, Inc. is the parent company of Allgas, Inc. Lampton-Love, Inc. is the parent company of Liquified Petroleum Gas Management, Inc. Ergon, Inc. is the parent company of Lampton-Love, Inc.

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REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. This Court Should Deny the Petition for Writ of Certiorari Because the Petitioners Fail to Demonstrate that the Decision of the Alabama Supreme Court Involves a Federal Question Which Would Provide this Court with Jurisdiction Pursuant to 28 U.S.C. § 1257.

II. This Court Should Deny the Petition For Writ of Certiorari Because the Petitioners Failed to Preserve any Allegation of a Violation of Their Federal Constitutional Rights Before the Trial Court or the Alabama Appellate Courts.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari to the Supreme Court of Alabama arises from an order denying, without opinion, the Petitioners' Petition for Writ of Certiorari to the Court of Civil Appeals of Alabama. The original lawsuit stated claims alleging violation of the Alabama Extended Manufacturer's Liability Doctrine (AEMLD), breach of express or implied warranties, negligence and wantonness. The defendants and respondents are Frigidaire Company, White Consolidated Industries, Lampton-Love, Inc. Allgas, Inc., Ronald Wayne Puckett, Bruce Laviner, and C.L. Jimmy Fortenberry. The plaintiffs and petitioners are Bobby W. Kennedy, Carolyn J. Kennedy, and Jimmy P. Kennedy, (hereinafter collectively "the Kennedys"). This brief is submitted on behalf of Lampton-Love, Inc., Allgas, Inc., Ronald Wayne Puckett, Bruce Laviner, and C. L. Jimmy Fortenberry (hereinafter collectively "Allgas").

This lawsuit began on April 5, 1997, when the Kennedys filed a complaint in the Circuit Court of Marshall County, Alabama, purporting to allege violation of the AEMLD, breach of express or implied warranties, negligence and wantonness. (C. 12-15).

On July 29, 1998, Allgas filed a Motion for Summary Judgment contending that there were no genuine issues of material fact and that judgment was due as a matter of law on each of the Kennedys' claims. (C. 270). After a hearing held on October 2, 1998, the first trial judge, the Honorable William D. Jetton, entered an order on December 9, 1998 on the case action summary overruling all defendants' motions for summary judgment. (C. 8). On January 13, 1999, Judge Jetton, in response to Motions to Reconsider the Order Denying Summary Judgment filed by all defendants and advice of the Kennedys' counsel, issued an order on the case action summary dismissing by consent the Kennedys' claims of breach of the implied warranty of fitness and the warranty of merchantability. (C. 8).

On July 6, 1999, after additional discovery was taken, Allgas again filed a motion for summary judgment contending that there were no genuine issues of material fact and that judgment was due as a matter of law on the Kennedys' remaining claims of violation of the AEMLD, negligence, and wantonness. (C. 952). After a hearing held on August 23, 1999, the trial judge, the Honorable Tim Jolley,

who had succeeded the retiring Judge Jetton, entered an order on August 30, 1999 granting summary judgment of all of the Kennedys' claims against all defendants. (C. 1409).

On September 24, 1999, the Kennedys filed a Motion for New Trial and/or to Alter, Amend, or Vacate the Summary Judgment Order and Request for Oral Argument. (C. 1418-1423). After a hearing held on November 5, 1999, Judge Jolley, in an order entered on the case action summary on December 7, 1999, denied the motion. (C. 10).

The Kennedys filed a Notice of Appeal to the Supreme Court of Alabama based upon the order denying the Motion to Reconsider. They did not appeal the order dismissing the claims of the breach of implied warranty of fitness and the warranty of merchantability. (C. 1430). On February 1, 2000, the Supreme Court of Alabama transferred this case to the Court of Civil Appeals pursuant to *Alabama Code* § 12-2-7 (1975). (C. 1437).

On June 9, 2000, the Alabama Court of Civil Appeals, affirmed, without opinion, the summary judgment entered by the trial court on behalf of all defendants. On August 4, 2000, the Alabama

Court of Civil Appeals denied the Kennedys' Application for Rehearing and the parties' motions pursuant to Rule 39(k) of the *Alabama Rules of Appellate Procedure.*

The Kennedys then filed with the Supreme Court of Alabama a Petition for Writ of Certiorari to the Alabama Court of Civil Appeals. On November 17, 2000, the Supreme Court of Alabama denied, without opinion, the Petition for Writ of Certiorari. On November 28, 2000, the Kennedys filed an Application for Rehearing with the Supreme Court of Alabama. On December 1, 2000, the Supreme Court of Alabama ordered the Application for Rehearing stricken pursuant to Rule 39(1) of the *Alabama Rules of Appellate Procedure.* On December 8, 2000, the Kennedys filed a Motion to Vacate and Set Aside the Order to Strike the Petition for Rehearing of the Writ of Certiorari and Remand this Case to Circuit Court for Trial by Jury. On December 13, 2000, the Supreme Court of Alabama ordered this motion stricken. This Petition to the Supreme Court of the United States thereafter followed.

ARGUMENT

I. BECAUSE THE PETITIONERS FAIL TO DEMONSTRATE THAT A FEDERAL QUESTION EXISTS, THIS COURT SHOULD DENY THEIR PETITION.

The Petitioners assert that this Court has jurisdiction to review the decision of the Alabama Supreme Court denying their Petition for Certiorari to the Court of Civil Appeals of Alabama pursuant to 28 U.S.C. § 1257. 28 U.S.C. § 1257 sets forth the grounds under which this Court may review a decision of the highest court of a State. It states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

The Petitioners' original lawsuit filed in the Circuit Court of Marshall County, Alabama, presented state law claims of violation of the Alabama Extended Manufacturers Liability Doctrine (AEMLD), breach of express or implied warranties, negligence, and wantonness. It made no allegation of any federal claim. After entry of summary judgment in favor of all defendants and the affirmance of those summary judgments by both the Alabama Court of Civil Appeals and the Alabama Supreme Court, the Petitioners now appear to attempt to argue that the entry of summary judgment against them constituted a violation of their constitutional rights which this Court should redress through certiorari review.

However, an examination of their Petition quickly reveals that the Petitioners do not set forth a valid ground under 28 U.S.C. § 1257 upon which this Court may exercise its jurisdiction to grant certiorari review. First, the Petition does not question the validity of a statute or treaty of the United States. Accordingly, the first basis by which this Court may review this decision does not exist.

Second, at no level in these proceedings do the Petitioners question the validity of any state statute as being repugnant to the

Constitution, treaties, or laws of the United States. Accordingly, the second basis under which this Court may exercise certiorari review of this matter does not exist.

Third, the Petitioners have failed to properly allege that any federal title, right, privilege or immunity is involved. Their original complaint merely sets out garden variety state law claims related to a fire which destroyed a lakehouse they owned. However, in their Petition to this Court, they submit that their constitutional rights were violated due to the summary judgment entered against them and due to a trial judge's comments that "they could not win as Pro Se in his court without an attorney." (See Petition for Writ of Certiorari) Such statements do not amount to specially setting up or claiming any right, title, privilege or immunity as required by Section 1257. *See Adams v. Robertson*, 520 U.S. 83 (1997)("when the highest court is silent on a federal issue before us, we assume that the issue was not properly presented. . . ."). Moreover, none of their submissions to the Alabama appellate courts clearly establishes a claim of a violation of any federal rights. As a result, the third possible ground upon which this Court may exercise jurisdiction does not exist. Because they fail

on all three applicable grounds available under Section 1257, the Petitioners have failed to demonstrate that a federal question exists which would provide this Court with jurisdiction to review by certiorari the decision of the Alabama Supreme Court. Accordingly, the Petition for Writ of Certiorari is due to be denied.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE THE PETITIONERS FAILED TO PRESERVE ANY ALLEGED FEDERAL ISSUES BY NOT PROPERLY ADDRESSING SUCH ISSUES BEFORE THE TRIAL COURT OR THE ALABAMA APPELLATE COURTS.

In reviewing a Petition for Certiorari to a state court, the Petitioners are required to demonstrate, or the record must clearly reflect that the claim(s) was presented to the state court. In *Webb v. Webb*, 451 U.S. 493, 496 (1981) this court stated:

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

The Court further stated:

> Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. As applied to the circumstances of this case, that statute requires that in the state court, petitioner have "specially set up or claimed under the Constitution . . . of . . . the United States" that right which [they] now seek[ ] to have this Court enforce . . . Similarly, our Rule 21.1(h) requires the petitioner[s] to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon the court."

Webb, 451 U.S. at 495. An examination of their Petition reveals no information which demonstrates that these alleged federal questions were brought up to the Alabama appellate courts. Because the Petitioners have failed to demonstrate that the federal claim was adequately presented to the state courts, their Petition is due to be denied.

Additionally, in *Adams v. Robertson*, 520 U.S. 83 (1997), the Petitioners sought certiorari review of a decision of the Alabama

Supreme Court approving a class action and settlement of the case. The Petitioners alleged that the certification of the class and settlement violated the Due Process Clause of the Fourteenth Amendment of certain members of the class. After initially granting the Petition, this Court dismissed it as improvidently granted due to the Petitioners' failure to properly present the federal issue to the Alabama Supreme Court.

In dismissing the Petition, this Court noted:

> with "very rare exceptions" we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams, 520 U.S. at 86 (citations omitted).

This Court then further explained how the Petitioners' failure to demonstrate that the issue was presented to the Supreme Court of Alabama was fatal.

> When the highest state court is silent on a federal question before us, we assume that the issue was

> not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here. . . ."

Id. at 86-87. The court then explained the manners in which an aggrieved party may demonstrate that the federal question was presented to the state court. It stated:

> We have described in different ways how a petitioner may satisfy this requirement. In some cases, we have focused on the need for petitioners either to establish that the claim was raised "at the time and in the manner required by the state law," or persuade us that the procedural requirements could not serve as an independent and adequate state law ground for the state court's judgment, ... In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time. . . ."

Id. at 87. This Court concluded by dismissing the writ because the Petitioners failed to carry their burden of showing that the federal question was properly presented to the Alabama Supreme Court.

In this matter, just as the Petitioners in *Adams* failed to carry the burden of demonstrating that the federal question was presented to the state court, the Petitioners have failed to demonstrate that their federal question(s) was properly before the Alabama Supreme Court. Their Petition alleges that their constitutional rights were impugned because the trial judge told them they could not win in his court without counsel. Interestingly, after being informed this they obtained counsel to represent them. However, no amended complaint was ever filed with the Circuit Court of Marshall County, Alabama alleging this supposed violation of their constitutional rights. Likewise, they did not raise this issue to the Alabama Court of Civil Appeals in their original appeal. Accordingly, this claim of violation of their constitutional rights was not properly presented to the appellate courts of Alabama.

Furthermore, an examination of the actual record in this case, not the voluminous inadmissible materials cited by Petitioners which are not a part of the record, reveals that the Petitioners' failed to properly make any claims of constitutional violations to the trial court or at any stage in the proceedings before the Alabama appellate

courts. In their original appeal to the Alabama Court of Civil Appeals, the only issue which could arguably be considered to raise an issue of a possible violation of their federal constitutional rights was phrased as follows:

> Whether appellants' constitutional rights were violated when appellants' Motion to Alter, Amend, Vacate and New Trial were denied.

(See Petitioners' Brief to Alabama Court of Civil Appeals)

However, much like their Petition to this Court, Petitioners' Brief filed in support of their original appeal was so incomprehensible that it failed to set forth any basis or support for this issue. Accordingly, the Alabama Court of Civil Appeals did not have any claim of violation of the Petitioners' constitutional rights before it. As a result, the Petitioners failed to clearly and concisely raise a question of federal law to the Alabama Court of Civil Appeals.

III. THE PETITIONERS' CLAIMS DO NOT CONSTITUTE FEDERAL CONSTITUTIONAL VIOLATIONS.

Even if this Court accepts the Petitioners' claims as properly submitted and ruled upon by the Alabama Supreme Court, which the

record clearly reflects is not the case, a cursory examination reveals that their claims do not constitute federal constitutional violations. Their main allegation in this Petition for Writ of Certiorari is that their constitutional rights were violated due to the entry of summary judgment against them and the affirmance of that summary judgment by the Alabama appellate courts. The first question presented in their petition begins as follows:

> Whether the petitioners were discriminated against and denied due process and equal protection of the law and denied a trial by jury when the circuit judge was biased against the petitioners issued a summary judgment in favor of the defendants, affirmed by the State Supreme Court. . .

(Petition for Writ of Certiorari)

This Court has previously upheld the summary judgment mechanism of disposing of cases. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1985) this Court stated:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on

> file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is that there be no *genuine* issue of *material* fact.

See also, Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden at trial.")

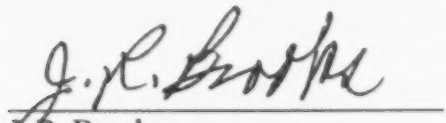
Although the case at bar was disposed of at the trial court level by Rule 56(c) of the *Alabama Rules of Civil Procedure*, the relevant language is identical. Accordingly, the analysis this Court has previously rendered regarding the appropriateness of the summary judgment process demonstrates that the entry of summary judgment against a party, in and of itself, does not constitute a

constitutional violation. Summary judgment is a long accepted and approved method of disposing of cases in which the moving party is entitled to judgment as a matter of law. In the case at bar, the Petitioners seek to turn the use of this accepted method against them into a constitutional violation. Because the Petitioners provide this Court with no legal authority supporting such a theory, they cannot and do not demonstrate that they have suffered a deprivation of their constitutional rights. Their petition is therefore due to be denied.

CONCLUSION

For all the foregoing reasons, Respondents Lampton-Love, Inc., Allgas, Inc., Bruce Laviner, Ronald Wayne Puckett, and C. L. Jimmy Fortenberry request this Court to deny the Kennedys' Petition for Writ of Certiorari.

Respectfully submitted,



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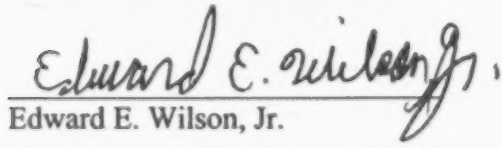

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the following by placing a copy of same in the United States Mail, postage prepaid and properly addressed, on this the 22 day of March, 2001:

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